In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1414

JOE GOOCH AND RAFAEL BUSTAMENTE, PETITIONERS

v.

JOHN N. MITCHELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 433 F. 2d 74. The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1970, and a petition for rehearing with suggestion for rehearing en banc was denied on December 1, 1970. The petition for a writ of certiorari was filed on March 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

423-479—71

QUESTION PRESENTED

Whether petitioners are entitled to a writ of mandamus requiring the Attorney General to abandon the longstanding practice of treating aliens possessing permanent resident visas, who commute from their homes in Canada or Mexico to places of employment in the United States, as duly admitted immigrants returning from temporary visits abroad.

STATEMENT

Petitioners filed this class action in the United States District Court for the Northern District of California pursuant to 28 U.S.C. 1361 on behalf of resident farm workers employed in southern California. The action sought mandamus directing the Attorney General to deny admission to alien "commuters"—aliens previously authorized for permanent residence in the United States who maintain homes in Canada or Mexico from which they commute daily or seasonally into this country to work. Two officers of the AFL–CIO intervened on behalf of that organization and its affiliates in support of the petition. The district court held that petitioners had standing to bring the action and granted summary judgment against them on the merits (Pet. App. B). The court of appeals affirmed, unanimously on the question of standing and with one judge dissenting on the merits (Pet. App. A).

The alien commuter practice that petitioners challenge has been utilized for over forty years, and presently involves some 30,000 to 40,000 persons who cross from residences in Mexico and Canada to their

jobs in the United States. Each commuter has previously been admitted into the United States for permanent residence under the provisions of the Immigration and Nationality Act of 1952 (8 U.S.C. 1101 et seq.), but has not actually taken up permanent residence here or indicated an intention to do so. (Pet. App. A, p. xi; Pet. App. B., p. xxxii.)

Based upon their continuing eligibility for permanent residence, the Immigration and Naturalization Service has considered such alien commuters as resident immigrants within the class defined in Section 1101(a)(27)(B): "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." This classification allows the Attorney General to admit the commuters, when they come here to work, pursuant to the informal documentation provisions of Section 1181(b), and it exempts them on reentry from the labor certification provisions of Section 1182(a)(14). Thus, the Attorney General has issued each commuter an alien registration receipt card (like that given resident aliens), upon presentation of which, and without more, commuters are allowed entry and reentry into the United States. This practice, although not expressly sanctioned by statutory language, has been continuously followed since the first restrictive legislation in this area, the Immigration Act of 1924. (Pet. App. A, p. iii; Pet. App. B, p. xxxii.)

Petitioners argued in the courts below, as they do here, that commuters are not within Section 1101(a)(27)(B) and thus are not eligible for the informal documentation privileges of Section 1181(b). In support of their argument petitioners cite a 1965 amend-

ment to Section 1181(b). Prior to the amendment the benefits of that section were available to "otherwise admissible aliens lawfully admitted for permanent residence *who depart from the United States temporarily*" (emphasis supplied). The amended version refers instead to "returning resident immigrants, defined in section 1101(a)(27)(B) of this title, who are otherwise admissible," incorporating the Section 1101(a)(27)(B) definition of a returning resident immigrant as one who is "lawfully admitted for permanent residence [and] who is *returning from a temporary visit abroad*" (emphasis supplied). According to petitioners (Pet. 7), "the clear meaning of the new language was to exclude the nonresident commuter" from the informal documentation privileges of Section 1181(b) and the exemption from the labor certification requirements of Section 1182(a)(14).

The government responded by detailing the long-standing and uninterrupted administrative practice under which commuters were and are considered resident immigrants within Section 1101(a)(27)(B), and have been accorded the benefits that follow from that classification. In the government's view, Congress—well aware of this classification [1]—has not modified or disapproved it despite numerous reconsiderations of the

[1] See, *e.g.*, S. Rep. No. 1515, 81st Cong., 2d Sess. 535–536, 616; H. Rep. No. 1365, 82nd Cong., 2d Sess. While Congress has continued to devote considerable attention to this area and specific legislation has been proposed (see, *e.g.*, S. 3545, 91st Cong., 2d Sess.; S. 1694, 91st Cong., 1st Sess.; H. R. 9505, 91st Cong., 1st Sess.), no such legislation has yet been enacted. The matter is still before Congress, as similar legislative proposals have been introduced this year. See S. 1373, 92nd Cong., 1st Sess.; S. 1488, 92nd Cong., 1st Sess.

general statutory pattern. Thus, the government argued and the courts below held, the 1965 amendment did not affect commuters adversely, since they remain within the "resident" category of the statute as amended.

The district court granted summary judgment for the government. It held that the 1965 amendment to Section 1181(b) "tacitly approves the longstanding [administrative] practice" under which commuters are considered to be resident immigrants within Section 1101(a)(27)(B), since the amendment specifically refers to the latter provision without changing its definition "and nothing in the legislative history of the 1965 amendments indicates that Congress in any way intended to change or prohibit the commuters' right of entry" (Pet. App. B, pp. xxxvi, xxxviii). In a detailed opinion, a divided court of appeals affirmed (Pet. App. A).

ARGUMENT

The decision below is correct, and there is no conflict of circuits or other reason for review by this Court.

1. As noted above, this decision is in complete accord with the unbroken administrative interpretation and application of Section 1101(a)(27)(B). The 1965 amendment to Section 1181(b), on which petitioners so heavily rely, did not alter the provisions of Section 1101(a)(27)(B), nor does the legislative history of that amendment show any Congressional disapproval of the well-known administrative practice with respect to commuters. As the court of appeals properly held, Congress simply did not address itself

to any problems associated with the commuter practice. In these circumstances, petitioners incorrectly argue that the statute forbids the established procedures whereby the Attorney General long has regulated commuter entries to this country.

2. We recognize that the District Court for the District of Columbia decided (*Amalgamated Meat Cutters & Butcher Work.* v. *Rogers*, 186 F. Supp. 114) that commuters are not within the Section 1101(a)(27)(B) definition of resident immigrants insofar as that section is incorporated by reference in Section 1182(a)(14), and that this decision perhaps conflicts, at least in principle, with the decision here.[2] But that decision was disapproved by the Court of Appeals for the District of Columbia Circuit (see *Texas State AFL–CIO* v. *Kennedy*, 330 F. 2d 217), just as it was by the Ninth Circuit in the present case (see Pet. App. A, p. xiii-xiv)[3]. In view of this there is no need for resolution by this Court.

---

[2] In our view *Amalgamated Meat Cutters* was wrongly decided. As noted here by the court of appeals, that case became moot and accordingly no appeal was taken (see Pet. App. A, p. xiv). The Immigration and Naturalization Service has narrowly limited the decision to its specific holding and has rejected arguments that it undermines the validity of the general commuter practice under Section 1101(a)(27)(B).

[3] *Amalgamated Meat Cutters* was decided in 1960, long before the 1965 amendment to Section 1181(b) on which petitioners rely. During deliberations on the proposed legislation, the Service made clear to Congress that it disagreed with this decision and would not follow it. Congress nevertheless did not specifically legislate on the commuter practice and thereby, we think, tacitly approved it once more. These facts substantially undercut petitioners' assertion, discussed earlier, that Congress intended by the Section 1181(b) amendment to change the law as to commuters.

3. Moreover, petitioners' statement (see Pet. 13–17) of the hardships which the commuter practice entails for United States working men presents an incomplete view. Prior to the restrictive legislation of 1924, persons from Canada and Mexico could freely cross to their jobs in the United States; no formal entry procedures were required. The commuter practice arose in response to the recognized need to continue free access to this country by these persons, and was "predicated upon good international relations maintained and cherished between friendly neighbors." *Matter of M—D—S— & L—G— & W—D—C,* 8 I. & N. Dec. 209, 213.[4] This practice has now continued for over forty years, and presently involves some 30,000 to 40,000 workers residing in Canada and Mexico. Quite obviously, these workers and their governments have a vital interest in protecting their livelihood, which may appropriately be balanced against petitioners' assertion of hardship. As noted, Congress to date has tacitly approved the commuter practice as consistent with Section 1101(a)(27)(B). In these circumstances, we submit, petitioners' remedy, if any, must come from Congress, to which their problems have been, and even now are being, presented (see note 1, *supra*).

[4] The Secretary of State submitted below an affidavit asserting his view that the exclusion of such commuters would have adverse foreign policy effects. See Pet. App. B, p. xxxix note 6.

CONCLUSION

For the foregoing reasons its is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971